

1 GARY M. RESTAINO
United States Attorney
2 District of Arizona
NOEL C. CAPPS
3 Assistant U.S. Attorney
Arizona State Bar No. 014361
4 Two Renaissance Square
40 North Central Avenue, Suite 1800
5 Phoenix, Arizona 85004-4449
Telephone: (602) 514-7500
6 Main Fax: (602) 514-7693
Email: Noel.Capps@usdoj.gov
7 *Attorneys for Defendant United States*

8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Trevor Reid, et al.,

12 Plaintiffs,

13 v.

14 United States Department of Interior, et al.,

15 Defendants.
16
17

No. CV-22-00068-PHX-SMB

**REPLY OF SUBSTITUTED
DEFENDANT UNITED STATES OF
AMERICA IN SUPPORT OF ITS
MOTION TO CONSOLIDATE AND
EXTEND THE RESPONSIVE
PLEADING DEADLINE
(FIRST REQUEST TO EXTEND)**

18 The United States of America (“United States”) replies in support of its Motion to
19 Consolidate and Extend the Responsive Pleading Deadline (First Request) (Doc. 17).
20 Plaintiffs agree that a consolidated responsive pleading deadline for all defendants would
21 be consistent with Rule 1, Fed. R. Civ. P. (Doc. 19, p. 1) (Plaintiffs’ Joint Response)
22 (“Response”). Plaintiffs admit personal service was not made on defendants Justin P.
23 Doyle, David Ballam, or Cynthia Sirk-Fear (the “individual defendants”). *Id.* Plaintiffs
24 argue that all defendants — “by operation of Plaintiffs’ Joint Notice of Voluntary Dismissal
25 of Specified Claims as to Particular Individual Defendants” (Doc. 18) (“Joint Notice”) —
26 have either been “served per [Rule] 4(i)(1), (2) . . . or substituted by a Defendant who has
27 been so served.” Response at p. 2. The Joint Notice voluntarily dismisses Plaintiffs’
28 constitutional (including *Bivens*) and *situs* (Virginia) common law and statutory claims

1 against the individual defendants only in their individual capacities. (Doc. 18, at p. 1). The
2 Joint Notice purports to maintain “every claim” against the individual defendants in their
3 official capacities. *Id.* at p. 2. Effectively, the Response presumes the individual
4 defendants can be liable in their official capacities and, therefore, service under Rule 4(i)(2)
5 is sufficient. This presumption, however, is erroneous. *See e.g., Daly-Murphy v. Winston*,
6 837 F.2d 348, 355 (9th Cir. 1987) (“Because a *Bivens* action can be maintained against a
7 defendant in his or her individual capacity only, and not in his or her official capacity, the
8 failure to perfect individual service is fatal to appellant’s *Bivens* action against the named
9 defendants.”) (citations omitted); *Consejo de Desarrollo Economico de Mexicali, A.C. v.*
10 *United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) (“This is because a *Bivens* suit against
11 a defendant in his or her official capacity would merely be another way of pleading an
12 action against the United States, which would be barred by the doctrine of sovereign
13 immunity.”). (Citation omitted).

14 Plaintiffs concede that personal service on the individual defendants has not been
15 made. The United States is not currently authorized to represent the individual defendants
16 for the non-FTCA claims. The Parties agree that a consolidated responsive pleading
17 deadline for all defendants would serve the purpose and spirit of Rule 1.

18 The United States, therefore, respectfully requests the Court enter an order
19 consolidating and extending the responsive pleading deadline for all defendants to sixty
20 (60) days after proper service is effectuated on all defendants.

21 RESPECTFULLY SUBMITTED this 17th day of June, 2022.

22
23 GARY M. RESTAINO
24 United States Attorney
District of Arizona

25 s/Noel C. Capps
26 NOEL C. CAPPS
27 Assistant United States Attorney
28 *Attorneys for the United States*

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

Trevor Reid
Crystale Reason
2606 N. 44th St.
Apt 316
Phoenix, AZ 85008
Crystale.Reid@gmail.com
Trevor.D.Reid@gmail.com

Plaintiffs Pro Se

s/ Lauren M. Routen
U.S. Attorney's Office